No. 20458

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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DOMINIC PETER GAGLIARDO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S ANSWERING BRIEF

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SUBJECT INDEX

CASES

STATUTES

RULES

TREATISES

I.

STATEMENT OF JURISDICTIONAL FACTS

The indictment herein charged in a single count a violation of Title 18, Section 1464, United States Code, an offense against the United States.

Under Title 18, Section 3231, United States Code, the United States District Court had original jurisdiction.

Upon the jury's verdict of guilty, Appellant was sentenced, and now appeals therefrom.

It is conceded that this Court has jurisdiction over appeals from such final decisions of a District Court under the provisions of Title 28, Section 1921, United States Code, and by virtue of Rule 27(a), Federal Rules of Criminal Procedure.

II.

STATEMENT OF THE CASE

This is an appeal from the conviction of appellant, Dominic Peter Gagliardo in the United States District Court for the District of Nevada.

The indictment upon which the conviction

is based charged Appellant (R. 2) [1] with having uttered obscene, indecent and profane language by radio communications over the citizens' band radio network, in violation of Title 18, United States Code, Section 1464.

Following a jury trial, Appellant was convicted and sentenced to the custody of the Attorney General for treatment and supervision under the Young Adult Offenders' Act, 18 United States Code, Section 4209 (R. 9).

After the foregoing judgment and conviction, Appellant filed a Notice of Appeal on August 6, 1965 (R. 10). Appellant's opening brief was filed on or about October 26, 1965, whereupon, Appellee, on or about November 29, 1965, filed a motion to remand, supported by affidavit and by stipulation of Appellant's counsel. On December 9, 1965, an order was endorsed and filed in this Court, remanding the case to the District Court. Subsequently it was determined that counsel, as well as the Trial Court were under the erroneous impression that

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[1] "R" as used herein refers to the Record on Appeal.

Appellant had, within five days of conviction, filed a motion in the District Court for a judgment of acquittal, or, in the alternative, for a new trial.

In view of this situation, and in the belief that this Court had remanded the case to the District Court for the sole purpose of permitting the District Court to reconsider a timely motion for a new trial, Appellee, on or about February 26, 1966, filed its application for instructions.

This Court, as a result thereof, on February 25, 1966, ordered the District Court to re-transfer the cause to it.

Factually, and examining the evidence in the light most favorable to Appellee, Appellant owned and utilized certain citizens' band radio equipment, including a transmitter. Early in April he was heard to state over the air that if someone went to a masquerade party, he wouldn't have to wear a costume, but could go as a "prick" (T. 11, 23, 34, 48, 54). [2]

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[2] "T" as used herein refers to the Reporter's Transcript of Proceedings.

He also called a person a "bastard" and "son-of-a-bitch" (T. 12).

In the course of a broadcast on or about April 8, 1965, Appellant was also heard to state: "You people have never liked me, I think you are a bunch of pricks" and further, "Fuck you all" (T. 35). He was also heard to say (T. 34), "God damn it".

Radio transmitters such as that used by Appellant could transmit a signal some 60 or 70 miles under the right conditions (T. 28), although it was testified by a defense witness (T. 83) that the normal range of a 3½ watt system would be, ordinarily, 10 to 12 miles.

It was further testified that under extreme conditions, a citizens' band operator could talk four or five thousand miles (T. 89) and that in any event, the size and power of the receiver is an element in determining at what distance a transmission of the type here involved could be heard (T. 90).

At the close of the Appellee's evidence, Appellant moved for a judgment of acquittal (T. 67), which the trial court denied (T. 70). The motion was renewed and denied prior to submission of the case to the jury (T. 122).

Appellant proposed an instruction (R. 7)

defining indecent and obscene language, which was refused by the trial court (T. 108). The Court thereafter gave its own instruction defining obscene words. (T. 117).

After the jury had commenced its deliberations, a note was sent by the foreman to the Court, requesting a dictionary (R. 15), and the Court replied that the jury could not have a dictionary (R. 15). Thereafter, the jury inquired by a written note (R. 16) as to whether they were to be concerned with the intent, and the Court replied:

> "You are to only concern yourself with whether the defendant used Obscene, Indecent or Profane language over the radio. You are not to concern yourself with the reasons or motive for such use." (R. 16)

It is conceded that both of the above mentioned communications to the jury were made by the Trial Court without the knowledge or presence of the Appellant or counsel for either side.

The Appellant has specified as error (Opening Brief, pp. i, ii):

1. That Title 18, United States Code, Section 1464, under which appellant was indicted and convicted is an unconstitutional exercise of power by Congress.

2. That the Trial Court erroneously instructed the jury.

3. That reversible error was committed as a result of the private communications between the Court and the jury.

4. That the Trial Court erroneously denied Appellant's motion for acquittal.

III.

SUMMARY OF ARGUMENT

1. Title 18, United States Code, Section 1464, constitutes a valid and constitutional exercise of Congressional power.

2. The trial Court properly instructed the jury.

3. Although it was error for the trial Court to communicate with the jury in the absence of Appellant and counsel, the Appellant was not prejudiced thereby.

4. Appellant's motion for judgment of acquittal was properly denied.

IV.

ARGUMENT

1. TITLE 18, UNITED STATES CODE, SECTION 1464, CONSTITUTES A VALID AND CONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER.

The Appellant was charged in the indictment with having, during the month of April, 1965, in Clark County, State and District of Nevada, uttered obscene, indecent and profane language by means of radio communications over the citizens' band radio network, regulated by the Federal Communications Commission in violation of Title 18, Section 1464, United States Code. (R. 2).

Appellant has taken the position (Opening Brief, pp. 20-27), that Section 1464 is an unconstitutional exercise of Congressional power; that the power governing intrastate radio communications is reserved to the states under the Tenth Amendment to the Constitution of the United States. Appellant also urges that the statute is ineffective and void as to him, since there is no charge that the challenged communication or transmission was interstate.

There is evidence (T. 28, 89, 90), that the transmissions travelled beyond the boundaries of the State of Nevada and were capable at least of being received in other states. There is no evidence that the transmissions were heard in any state other than Nevada.

In view of the foregoing, Appellee cannot concede that the transmissions were purely intrastate.

Assuming, arguendo, that the transmissions were purely intrastate in nature, it is nevertheless Appellee's position that they are within the power of Congress to regulate and police, pursuant to Section 1464, United States Code.

Section 1464, United States Code is taken from the last sentence of Title 47, United States Code, Section 326 (1940 ed.), and the penalty provision of Title 47 United States Code, Section 501 (1940 ed.), which are Sections 326 and 501 respectively, of the Communications Act of 1934 (Volume 48, United States Statutes at Large, pp. 1064 through 1105).

Section 326 (48 Stat. 1091), provides in part:

"No person within the jurisdiction of the United States shall utter any obscene, indecent or profane language by means of radio communications."

Section 501 (48 Stat. 1100; 47 U.S.C. 501), provides a general penalty of $10,000 fine, or imprisonment for not more than two years, or both, for violations of the Communications Act of 1934 (where no specific penalty is set forth).

Section 301 (48 Stat. 108; 47 U.S.C. 301), provides for the licensing of persons making radio transmissions.

Section 605 (48 Stat. 1103; 47 U.S.C. 605) generally prohibits the unauthorized use and divulgence of transmissions by radio or wire, and provides in part:

" . . . no person not being authorized by the sender shall intercept <u>any communication</u>". (<u>Emphasis added</u>)

Although there is unfortunately little or no case law interpreting Title 18, United States Code, Section 1464, a substantial body of law has developed concerning the various provisions of the Communications Act, more particularly Sections 605 and 301, which, it is felt, are helpful in determining the Congressional

intent and authority concerning 18 United States Code, Section 1464.

It is the appellee's position that 1464, like its predecessor, 47 United States Code 326 (1940 ed.) is not expressly limited to interstate radio communications. Its broad language:

". . . by means of radio communication . . . "

is not substantially different from the second clause of 47 United States Code, 605,

". . . no person not . . . authorized . . . shall intercept any communication . . ."

and the fourth clause of Section 605:

". . . no person having received such intercepted communication . . .".

Certainly Section 605 must be considered as an adjunct to Section 501, which provides the penalties.

Examining first the cases under Section 605, involving wire communications, the Court's attention is respectfully called to Weiss v. United States, 2 Cir. 1939, 103 F.2d 348, wherein the defendants were convicted of mail fraud and conspiracy

as a result of government wiretapping of messages received by them. Only evidence of intrastate messages were offered at the trial. The Supreme Court reversed the conviction, Weiss v. United States, 1939, 308 U.S. 321, 84 L. Ed. 298, 60 St. Ct. 269, noting a distinction between the second and fourth clauses of Section 605 and the first and third clauses, the latter two of which expressly refer to interstate or foreign communications.

The second clause, prohibiting the interception and divulging of any communication caused the Court to state (308 U.S., at 327):

> ". . . as Congress has power, when necessary for the protection of interstate commerce to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications." (Footnotes omitted).

With respect to the modifying language ("interstate or foreign") found in the section, the Court stated, at page 329:

"The Commission's regulatory powers and administrative functions have to do only with interstate and foreign communications. But §605 delegates no functions and confers no power upon the Commission. It consists of prohibitions, sanctions for violation of which are found in §501. We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence." (Footnotes omitted)

The Court ruled that the intrastate communications were inadmissible against the defendants. To the same effect, see United States v. Klee, 3 Cir. 1938, 101 F.2d 191; Sablowsky v. United States, 3 Cir. 1938, 101 F.2d 183; United States v. Janello, 3 Cir. 1939, 102 F.2d 587; and Diamond v. United States, 6 Cir. 1938, 108 F.2d 859.

Some 18 years after the Weiss decision, supra, the Supreme Court decided Benanti v. United States, 1957, 355 U.S. 96; 2 L. Ed. 2d 126; 78 S. Ct. 155, in which it reversed a conviction where there

was a wiretap by state officers of intrastate messages and the evidence received made available to federal officers for use in a federal trial. The Court stated, 355 U.S. at 104:

> "The Federal Communications Act is a comprehensive scheme for the regulation of interstate commerce".

The Court added, as a footnote:

> "The primary purpose of the Act was to create a commission 'to regulate all forms of communication and to consider needed additional legislation'. H. Rep. No. 1850, 73d Cong., 2d Sess. 3."

In reexamining the Weiss decision, the Court indicated that intrastate communications cannot be ignored because,

> "The interceptor cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in Section 605 in such a vulnerable position." (355 U.S., at 105).

As an aside, the writer would like to point out that a person who utters obscenities or

indecencies by radio cannot insure that such broadcast is purely intrastate, and without effect upon interstate communications.

In United States v. Gris, S.D.N.Y., 1956, 146 F. Supp. 293, the defendant moved to dismiss an indictment charging the wiretap violation of Section 605, because it didn't allege interstate or foreign communication.

The District Court denied the motion, citing the Weiss decision, and stated (146 F. Supp. at 295):

> "Since Section 605, which this defendant is charged with violating, covers intrastate as well as interstate communications, as the Supreme Court held in the Weiss case, the indictment charges this defendant with a crime, whether the intercepted communications were intrastate or interstate."

The District Court, in Gris further stated, at page 295:

> "The Weiss case is conclusive against the defendant's contention that the indictment is insufficient for failure to specify that the communications were interstate."

The conviction of Gris was affirmed in Gris v. United States, 2 Cir. 1957; 247 F.2d 860, with the Appellate Court essentially relying on Weiss.

In United States v. Lipinski, D.C. New Mex., 1957, 151 F. Supp. 145, defendant moved to dismiss the indictment charging interception of telephone messages admittedly intrastate in nature, but the parties acknowledged that the wires which had been tapped also carried interstate messages.

The District Court stated (at page 148),

> "It is pointed out in the Weiss case that, when necessary to protect interstate and foreign commerce, the Congress has undoubted power to regulate intrastate commerce, and the exercise of that power of Congress, for such purpose, invades no constitutional right."

The conviction was affirmed in Lipinski v. United States, 10 Cir. 1958, 251 F.2d 53, where the Appellate Court stated, at page 55, that Congress has plenary power to legislate

> ". . . for the government of interstate commerce, its protection and advancement, and for its growth and safety; and within the range

"of that power lies power to regulate intrastate activities when it is necessary for the protection of interstate commerce."

Of the Section 605 cases dealing with radio communications, the Court's attention is called to United States v. Sugden, 9 Cir. 1955, 226 F.2d 281, affirmed per curiam, 351 U.S. 916, 100 L. Ed. 1449, 76 S. Ct. 709.

This case is important for its language in applying the restraints of Section 605 to apparently intrastate radio communications. The defendants had a licensed farm radio station used to communicate with workers in the fields. Intercepted communications produced evidence of Immigration Law violations and a portion of the communications were made prior to the time the defendants became licensed operators, the remaining communicltions having been made subsequent to their being licensed. Based upon Section 605, the District Court suppressed all evidence thus obtained, and quashed the indictment.

On appeal, this Court indicated that if

the station and operators are licensed, then the Government may monitor communications only in connection with the policing and enforcing of the Communications Act (226 F.2d at 285). The Court further indicated, however, that while the defendants were using the radio before they were licensed, then anyone hearing the communication was at liberty to make full disclosure, Section 605 not applying, since the unlicensed use was illegal.

The Court ruled, in effect, that such of the evidence as was obtained from the illegal broadcasting should not have been quashed.

It is apparent that the Court held that federal jurisdiction attached to both the illegal and protected communications, although it appears from the facts that only intrastate communications were involved.

It is interesting that this Court, in Elkins v. United States, 9 Cir. 1959, 266 F.2d 588, vacated on other grounds, 364 U.S. 206, 4 L. Ed. 2d, 1669, 80 S. Ct. 1437, cited Lipinski and Sugden, both supra, after stating (266 F.2d at 593), as to

the second clause of Section 605:

". . . the term 'any communication' includes intrastate communications."

In United States v. Fuller, N.D. Cal., S.D. 1962, 202 F. Supp. 356, the District Court was concerned with a motion to dismiss an indictment charging unauthorized interception of police radio broadcasts, which the defendant made available to a commercial radio station for news broadcasting purposes.

The District Court (at page 358), stated that Congress'

". . . Constitutional power to regulate the field of communication by radio and other means of interstate or foreign communication is too well established to require citation of authority."

That Court concluded, in substance, that Section 605 was intended, inter alia, for the protection of public safety radio services which, it it is here noted, usually involve intrastate messages. By analogy, it would seem apparent that

18 U.S.C.1464 applies to police radio systems, whether of an interstate or intrastate character.

In view of the foregoing cases, it would clearly appear that Congress used Constitutional power as expressed in Section 605 to affect intrastate communications, and that the Communications Act is a comprehensive scheme to control, regulate and prohibit as to both wire and radio communications in general. The cases at the very least indicate that if there is a capacity for interstate transmission, then the interception and divulgence of intrastate messages fall within Section 605.

From the broad language of Sugden and Fuller, supra, it would appear, however, that intrastate wire or radio communications without more, are within the Constitutional reach of Congress, and that the field has been pre-empted by Congress, both in the Communications Act and in 18 United States Code, 1464.

The second line of cases are those dealing with Section 301 of Title 47, United States Code, which provides for licensing. Each of the

following three cases exhibits a strained effort by the Courts to find "interference" with interstate commerce, and in each of these, the interference is certainly slight. In any event, there is considerable broad, sweeping, general language supporting the inclusion of intrastate radio broadcasts within the scope of the Communications Act.

In the case of United States v. Gregg, S.D. Tex. 1934, 5 F. Supp. 848, the Government sought to enjoin the operation of an unlicensed station. The messages broadcast were definitely intrastate, and the Court concluded (at pp. 850, 851) that "under normal circumstances" the broadcasts could not be heard outside of Texas; the broadcasts had no "effects" outside of Texas, and did not interfere with out of state broadcasts.

It was pointed out, however, at p. 851, that "there are times" when the station does interfere with the reception of broadcasts in Texas from out of state, and thus the Court found interference with interstate broadcasts.

The Court stated, 5 F. Supp., at page 854, that Congress has exclusive power of interstate

communications, and

". . . this Federal power extends over intrastate communications where it is intermingled with interstate communications or interferes with interstate communications".

The Court, at page 857, went on to say that the Congressional requirement of licensing intrastate stations is reasonable when one considers that

" . . . a sufficient number of unlicensed and unregulated intrastate stations on different frequencies could interfere (sic) and even destroy all interstate radio broadcasting".

If this language were to be accepted, then it could well be argued that the mere potential harm to interstate communications places intrastate communications under the Act.

The case of United States v. Betteridge (D.C. N.D. Ohio, E.D. 1942, 43 F. Supp. 53), is interesting for its perhaps unnecessarily broad language to the effect that all radio operations fall within the scope of the Communications Act. In that case the Court stated, at page 55:

"It is needless to go into a lengthy dissertation on the inherent natural characteristics of radio transmission to arrive at the inescapable conclusion that all transmission of energy, communications or signals by radio, either using interstate or foreign channels of tranmission so affect interstate or foreign channels as to require the regulation of their use by licensing or otherwise, if the announced purpose of this section, i.e., the retention of control in the United States of all channels of interstate and foreign radio communication, is to be carried out effectively." (Emphasis added.)

In C. J. Community Services, Inc. v. Federal Communications Commission, D.C. App. 1957, 246 F.2d 660, a television booster station in the State of Washington interfered only with interstate communication to the extent that a citizen of Spokane had difficulty with the reception on his television set. The Court, acknowledging that the interference with interstate commerce was negligible, stated, at pages 662, 663, that it was satisfied from reading Section

301,

". . . that Congress intended to assert control by the Federal Government over 'all the channels of interstate . . . radio transmission', and that the sweep of the communications authority includes the booster station here involved."

Also of interest is the language of Whitehurst v. Grimes, E.D. Ky., 1927, 21 F.2d 787, involving a city tax on amateur radio operators and radio broadcasting, where the court stated, at page 787:

"Radio communications are all interstate. This is so, though they may be intended only for intrastate transmission; and interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation."

In Dumont Laboratories v. Carroll, E.D. Pa., 1949, 86 F. Supp. 813, affirmed 184 F.2d 153, the Commonwealth of Pennsylvania sought to censor motion pictures for television transmission, and it was

held that Congress had pre-empted the field. The Court stated, 86 F. Supp, at p. 815:

> "Notwithstanding the provision of 47 U.S.C. 326 denying Federal Communications Commission censorship, it is clear that Congress has made a plenary exercise of its power to regulate and a complete occupation of the field, including censorship. The civil licensing sections indicate this, as well as 18 United States Code 1464, which was originally part of 47 United States Code 326." (Emphasis added.)

An examination of the cases leads to the conclusion that Dumont Laboratories, supra, is the only case reported under Section 1464, involving any of the problems in the case at bar.

The comparison, however, of relevant sections of the Communications Act would justify the conclusion that Section 1464 may still be considered part of that Act. The foregoing cases deal with the power of Congress over communications, the scope of the Act itself and particularly its application

to intrastate communications. The cases indicate that Congress, under the Commerce Clause, has pre-emptive power over interstate communications, and that Congress has exercised plenary control over the subject. Unlike the purely regulatory provisions of the Act, Section 1464 of Title 18, as was Section 326 of the original Act, is a straight prohibitive provision, as are portions of Section 605 of the Act. The cases under Section 605 indicate that if communications intended for intrastate reception actually cross state lines or actually interfere with interstate communications, then they fall within the scope of the Act. Even if the equipment has the capacity to reach out of the state or to interfere, without proof that it did in fact, it would come within the purview of Section 605.

By analogy, the same principle applies to radio broadcasts under 18 United States Code, 1464. The testimony contains substantial evidence that the broadcasts in question had the capacity to reach other states from the Las Vegas, Nevada, area (T. 28, 89) and additional evidence indicated that a more powerful than customary receiver would possibly be

able to pick up the broadcasts in a second state.

Effective protection of interstate communications requires that such broadcasts as were involved be subject to the sanctions of Section 1464. The purpose of this provision is to protect persons legitimately using their equipment from indecent, obscene or profane language. It would be probably fair to say that an additional purpose is to protect members of the public also from such language, and it is pointed out that in the broadcasts in question, the wife, and possibly the children of the witness Sartain heard the utterances (T. 41), as well as the son of the witness Donna Newmen (T. 53, 63).

The cases under Section 301 of the Act, as can readily be seen, all broadly support the contention that Congress, through the Act, has exercised its power to reach virtually all radio communications, apparently on the premise that the nature of radio communications is not really severable into interstate and intrastate categories.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

The Appellant argues (Opening Brief, pp. 28-33), that the trial court erroneously failed to instruct the jury that in order for the questioned language to be obscene or indecent within the meaning of 18 United States Code, 1464, it must be calculated to arouse sexual passions and desires.

The Trial Court, refusing to instruct the jury as above indicated, charged as follows:

> "Profane language, as used in this case, must be such language as shows irreverence for Holy things. In other words, the language used must impart imprecation of divine vengeance, or imply divine condemnation. Regardless of how offensive the word may be, it is not profane unless such language is irreverent toward God or Holy things.
>
> "An obscene word or words is defined by the Supreme Court of the United States as follows:
>
> "'if to the average person applying contemporary community standards the word, or

"'words, have to do with the prurient, the lewd, or the lascivious'". (T. 117)

Practically all of the case law dealing with obscene material and language arises from prosecutions under Section 1461, Title 18, United States Code, which deals with postal laws and nonmailable matter. That section declares nonmailable

> "Every obscene, lewd, lascivious or filthy book . . . or other publication of an indecent character . . ." (Emphasis added.)

Section 1464 of Title 18, the section involved in the case at bar, prohibits the uttering by radio communication of ". . . any obscene, indecent, or profane language." (Emphasis added.)

The Supreme Court of the United States has had occasion to discuss the meaning of obscenity and related items in four noteworthy cases.

In Rosen v. United States, 1896, 161 U.S. 29, 40 L. Ed. 606, 16 S. Ct. 434, the Court reviewed conviction, U.S. Rev. Stat. §3893, which contained language substantially the same as used in 18 United States Code, 1464, supra.

In affirming the conviction, the Court stated (161 U.S. at p. 43), in approving an instruction given by the trial Court:

> "That was what the court did when it charged the jury that 'the test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall.' ' Did it', the court said, 'suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?' In view of the character of the paper, as an inspection of it will instantly disclose, the test prescribed for the jury was quite as liberal as the defendant had any right to demand."

Later in 1896, the Court, in Swearingen v. United States, 1896, 161 U.S. 446, 40 L. Ed. 765, 16 S. Ct. 562, reversed and awarded a new trial in another case involving U. S. Rev. Stat. Sec. 3893. The Court stated, 161 U.S. at p. 451,

> "The words 'obscene', 'lewd', 'lascivious' as used in the statute, signify that form of immorality which has relation to sexual

"impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel."

The trial court there had merely charged the ury that the newspaper article in question was bscene and nonmailable matter.

The next major decision on the subject as United States v. Limehouse, 1932, 285 U.S. 424, 6 L. Ed. 843, 52 S. Ct. 412. There the government ad appealed under the Criminal Appeals Act from a uashing of its indictment under Section 211 of he Criminal Code of 1911, involving identical anguage with that in 3893, and considered in Rosen nd Swearingen, supra, except that Section 211 had dded the words "and every filthy" book, letter, etc.

In the Limehouse case, the defendant had ailed several letters which were "coarse, vulgar, isgusting, indecent, and unquestionably filthy ithin the popular meaning of that term". The istrict Court had quashed the indictment, finding hat none of the letters in question was obscene within he meaning set forth in Swearingen. That is, he language used was not "'calculated to cor- upt and debauch the mind and morals of those into ose hands it might fall' and induce sexual

"immorality."

The Court determined that the amendment to the statute which had added the term "filthy book . . ." added an additional category which included at least some of the letters in question. The Court stated, 285 U.S., at 426,

"The letters here in question plainly relate to sexual matters".

In the last siginificant decision by the Supreme Court, Roth v. United States, 1957, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, the Court upheld the constitutionality of Section 1461, indicating that its decision might have been otherwise, had not the proper standard of obscenity been applied. The standard approved was:

"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest".

This clearly would be the applicable test or standard governing the courts today when obscene writings, papers, letters, magazines, etc. are involved,

and this was undoubtedly the standard relied upon by the District Court in the case at bar (T. 117).

Yet, in the case at bar, there is no story or plot to which the standard can be applied. We have merely certain extremely vulgar words uttered for any and all to hear who might have been listening to the particular broadcasts.

The question then arises as to whether the words used by the Appellant are "indecent" as that term is used in Section 1464, and whether that term means something different than "obscene".

It was indicated, in United States v. Keller, 3d Cir. 1958, 259 F.2d 54, that words "lewd," "lascivious" and "indecent", as used in Section 1461 did not establish categories of nonmailable matter, which can be distinguished from "obscene" matter.

This Court has faced the question on numerous occasions, commencing as early as 1918, when it decided Magon v. United States, 9 Cir. 1918, 248 F. 201, and considered the term "indecent". It there stated, at page 203:

". . . while the meaning assigned to the word 'indecent' in the statute by the amendment of 1911 is new, the method of its application is as old as the statute itself. It is for the Court to determine in the first instance whether any given language can have the tendency attributed to it, and for the jury to determine whether it has such tendency in fact. A defendant charged with sending of indecent matter through the mail is therefore, . . . in the same position that a defendant charged with sending obscene matter has always been in . . .".

This Court, in Duncan v. United States, 9 Cir. 1931, 48 F.2d 128, cert. den. 283 U.S. 863, 75 L. Ed. 1468, 51 S. Ct. 656, affirmed a conviction for broadcasting of obscene, indecent and profane language by radio. The appellant took the position that the language was neither obscene nor indecent, urging in his brief (48 F.2d, at 131):

"Language is not obscene, indecent or profane within the legal meaning of the terms, except it is calculated to promote violation of the law and the general corruption

of morals. It is determined by the sensibilities and moral standards of a people, as evolved from generation to generation, that change with the times and civilization."

The Court determined, at page 134, that the indictment was good and the conviction should be affirmed, by reason of the use of profane language,

". . . having referred to an individual as 'damned', having used the expression 'By God' irreverently, and having announced his intention to call down the curse of God upon certain individuals . . ."

the court found the remaining language (at 132), to be "abusive and objectionable", but not to have any tendency to excite libidinous thoughts on the part of the hearers, and concluded that the language was not within the category of obscene and indecent, as those terms are used in the Communications Act.

It is Appellee's suggestion that if the language used by Appellant Gagliardo had been broadcast and before the Court in Duncan, there would have been no hesitation by that Court in determining such language to be within the purview of the statute, based on the Court's

decision in Magon, supra, since the words used, regardless of their context, would tend to corrupt morals.

This Court reaffirmed the position it had taken in Magon, supra, when it decided Burstein v. United States, 9 Cir. 1949, 178 F.2d 665.

There the trial court, in considering a postal offense involving an allegedly obscene book instructed the jury (at p. 666):

> "Matter is obscene, lewd or lascivious within the meaning of the quoted statute, if it is offensive to the common sense of decency and modesty of the community and it must suggest or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard."

Upon request of the jury, an additional instruction was given, as follows (p. 667):

> "You are instructed that the words 'obscene, lewd or lascivious' as used in the statute . . . have the meaning of that which

"is offensive to chastity and modesty. They mean that form of indecency which is calculated to promote the general corruption of morals."

See also Verner v. United States, 9 Cir. 1950, 183 F.2d 184, 185.

In a most thorough opinion by the late John R. Ross, District Judge for the District of Nevada, this Court, in One, Inc. v. Olesen, 9 Cir. 1957, 241 F.2d 772, reversed per curiam 355 U.S. 371, 2 L. Ed. 2d 352, 78 S. Ct. 364, noted, at page 775, that such words as obscene and indecent are

"Words of common usage and meaning. In considering the scope and meaning of the words the courts have, through the course of the years, given to such words legal definitions and distinctions following very closely, if not precisely, the definitions and distinctions found in the recognized standard dictionaries."

The terse reversal of the Court's decision in One, Inc., was considered in Eastman Kodak Co. v. Hendricks, 9 Cir. 1958, 262 F.2d 392, 396. This was a replevin action for the recovery of certain movie film which the Kodak company had, upon developing,

refused to deliver to the sender, being fearful of violating the California obscenity statutes.

In referring to One, Inc., the Court stated, at page 396:

> "To this Court, the contents of the publication seemed clearly objectionable as 'obscenity', just as 'hard core' pornography would be, and had little doubt that most people would so regard it. This Court simply takes the view that the only sensible explanation of the reversal of One, Inc. is the Supreme Court decided 'the wrong yardstick' was used."

In pondering the effect of the reversal of One, Inc., and other cases in comparison with the affirmance of Roth, supra, and related cases, the Court stated, at page 397:

> "It may be to oversimplify, but it looks . . . as if 'prurient' is to be the talisman. And out of 'prurient' it would seem that obscenity is shifting from the standard of distasteful to a majority of people to a standard of disgusting, really lewd, shameful, or excites morbid interest in sex. Perhaps

"the shift is from 'bad' to 'awful'."

The Court goes on to note, however, that there may be a tendency on behalf of the Supreme Court to apply a stricter yardstick in cases where advance suppression of material is involved than in cases involving criminal convictions for the same material.

It appears that the most recent determination of this Court is Ackerman v. United States, 9 Cir. 1961, 293 F.2d 449, where a conviction under Section 1461 for mailing obscene matter was affirmed, the Court noting that the Roth standard had clearly been met, the matter involved being hard core pornography.

As indicated before, Appellee's position is that the words used by the Appellant over the air were obscene and indecent in themselves. His motive in using them, and the possibility that they were used in anger have no redeeming effect, and they must be termed either obscene or indecent within the meaning of the statute if the purpose of Congress to protect the radio public is to be given any meaning at all.

Appellee has not attempted to set out any extensive written argument on the question of whether Appellant's utterance, "God damn it" is proven within the meaning of Section 1464, but Appellee does not thereby intend to waive anything. It is merely felt that the remaining objectionable language used by the Appellant would be more offensive to the average person hearing it, and thereby is deserving of more extensive discussion.

3. ALTHOUGH IT WAS ERROR FOR THE TRIAL COURT TO COMMUNICATE WITH THE JURY IN THE ABSENCE OF APPELLANT AND COUNSEL, THE APPELLANT WAS NOT PREJUDICED THEREBY.

Appellant urges (opening brief, pp. 34-39) that prejudicial and reversible error was committed when the trial court communicated with the jury out of the presence of counsel and the defendant.

After the jury had retired to deliberate, it sent a written note to the judge requesting a dictionary. The court replied,

> "I am sorry but you cannot have a dictionary. You must rely entirely upon the instructions of the Court in considering the evidence in the case." (R. 15).

Thereafter, the jury inquired, in writing,

> "Are we to determine the intention of the use of profane and/or obscene language or just the use of the words over a citizen band radio?"

The Court replied:

> "You are to only concern yourself with whether the Defendant used Obscene, Indecent or Profane language over the radio. You are not to concern yourself with the reasons or motive for such use." (R. 16).

As to each communication, Appellee must concede there was error, if for no other reason than that the appellant was not present. It is submitted, however, that unless there was some real prejudice to the Appellant, such error should not necessarily result in the reversal of the conviction.

It is submitted without authority that the Appellant was not prejudiced by the refusal of the trial court to supply a dictionary to the jury.

As to the second communication, there is of course a serious question.

The Supreme Court considered a similar matter in Fillippon v. Albion Vein Slate Co., 1919, 250 U.S. 76, 63 L. Ed. 853, 39 S. Ct. 435.

There the trial court, in a negligence case

gave a written instruction to the jury on the question of contributory negligence in the absence of counsel and the parties. There, it was held that such conduct was erroneous and the case was ordered remanded.

In Shields v. United States, 1927, 273 U. S. 583, 71 L. Ed. 787, 47 S. Ct. 478, the trial court, out of the presence of the defendants and counsel, received a jury verdict as to certain defendants and instructed the jury to continue to deliberate concerning the guilt or innocence of other defendants as to whom the jury had disagreement. The conviction of Shields was reversed.

In United States v. Compagna, 2 Cir. 1944, 146 F.2d 524, cert. den. 324 U.S. 867, 89 L. Ed. 1422, 65 S. Ct. 912, Judge Hand wrote the decision which concerned the trial judge who, in responding to a request by the jury for the reading back of certain testimony, stopped in the jury room and inquired as to what they desired, and told them that they could go to lunch and have the testimony read back subsequently. The Court stated, at page 528:

". . . it is most undesirable that anything should reach a jury which does not do so in the courtroom. This is, indeed, too well settled for debate . . . But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. . . . There cannot be the slightest doubt here that the informality--for, at most, it was no more--did not prejudice the accused."

This court has considered the problem, so far as the writer can determine, on two occasions. In Ah Fook Chang v. United States, 9 Cir. 1937, 91 F.2d 805, one of the questions raised was the trial court's communication to the jury foreman in chambers, concerning the effect of a confession. The Court stated, at page 810:

" It is error for the court to instruct or communicate with the jury in the absence of counsel and without notice to them."

The Court went on to state,

"Not all error, however, is reversible error. If the record shows affirmatively that the Appellant was prejudiced, there is reversible error . . . on the other hand, if the record shows affirmatively that appellant was not prejudiced, then the error does not require reversal . . . finally, if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal."

This Court again faced the question in Ferrari v. United States, 9 Cir. 1957, 244 F.2d 132, cert. den. 355 U. S. 873, 2 L. Ed. 2d, 78, 78 S. Ct. 125, where the jury requested certain records and the Court replied that they were unavailable and not in evidence and thus the jury could not have them. The Court determined that such was not a new instruction nor even a statement of law. The Court held that the error, if any, was not reversible, and the conviction was affirmed.

Other circuits, notably the District of Columbia, the Third, Fifth, Sixth and Tenth Circuits have also had occasion to consider similar situations.

In Jones v. United States, D.C. App. 1962, 308 F.2d 307, the Court, having already found error, noted, at page 311, that there was correspondence between the judge and jury without notice to counsel. The note was thereafter lost and the Court merely stated,

> "It is obvious error to instruct the jury without notice to counsel. Proper procedure requires that a jury be instructed in the courtroom in the presence of counsel and the defendant, and that counsel be given opportunity to except to the additional instruction." (Footnote omitted).

Later that same circuit considered Walker v. United States, D. C. App. 1963, 322 F.2d 434, cert. den. 375 U.S. 976, 11 L. Ed. 2d 421, 84 S. Ct. 494. There, the court, in response to an inquiry from the jury, had certain testimony read back to him, whereupon he notified the jury as to his conclusions from the testimony. The Court did not find prejudice under either Rule 43 of the Criminal Rules of Procedure nor Rule 52(a). It cited, at page 436, the state case of LaGuardia v. State, 190 Md. 765, 58

A.2d 913, 917 (1948):

> ". . . If the record shows affirmatively that the Appellant was prejudiced by an improper communication of the judge with the jury, there is reversible error; and also . . . if the record shows error by such communication but does not show whether or not the error was prejudicial, it is presumed to be prejudicial and requires a reversal . . . On the other ahdn if the record shows affirmatively that the communication had no 'tendency to influence the verdict' . . . the judge's impropriety in communicating with the jury out of the presence of the defendant does not require a reversal. . . . "

There have been three occasions for the matter to be dealt with by the Third Circuit. In Arrington v. Robertson, 3 Cir. 1940, 114 F.2d 821, the court held that it was a denial of due process for the trial judge to send instructions to the jury in the absence of defendant or counsel and without notice and an opportunity to be present. The Court stated, at page 823:

> "We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant, regardless of the nature or propriety of the instruction given."

In United States v. Noble, 3 Cir. 1946, 155 F.2d 315, the trial court apparently sent some written material out with the jury to read if they desired, rather than including such material in his charge to the jury, and the Court stated, at page 318:

> "For not only are counsel and the defendant entitled to hear the instructions in order that they may, if they are incorrect object to them and secure their prompt correction by the trial judge, but it is equally important to make as

"certain as may be possible that each member of the jury has actually received the instructions. It is therefore essential that all instructions to the jury be given by the trial judge orally in the presence of counsel and the defendant."

In United States v. Neal, 3 Cir. 1963, 320 F.2d 533, the trial court received an inquiry from the jury as to whether it could recommend leniency, and the judge replied in the absence of the defendant. The Court, citing Rule 43 of the Federal Rules of Criminal Procedure, Evans v. United States, infra, and United States v. Noble, supra, reversed the conviction and remanded the matter to the trial court.

From the foregoing three cases, it becomes quite apparent that the rule in the Third Circuit is one of strict adherence to the requirement that the defendant be present at all stages of the proceedings.

In the Fifth Circuit, in Outlaw v. United States, 5 Cir. 1936, 81 F.2d 805, cert. den. 298 U.S. 665, 80 L. Ed. 1389, 56 S. Ct. 747, dealt with a situation where the jury had been charged orally and after considerable deliberation requested a copy of the charge which they had been given. The trial judge

had the same prepared by the stenographer and sent to the jury without the knowledge of defendant and his counsel. The court ruled (at page 808), that inasmuch as the written instruction was no different from the oral charge, there was no prejudice requiring reversal. In doing so it noted, at page 808:

> "It is a misconduct for the judge to hold any important communication with the jury regarding the case unless openly and with opportunity to the accused to be present and to object. Private communications, however harmless in themselves, may open the way to abuse and may destroy the confidence of the accused and of the public in the fairness of the trial. By the great weight of authority, they constitute error, especially in a criminal trial."

The Court of Appeals for the Sixth Circuit reversed a conviction where the trial judge had given additional instructions to the jury in the defendant's absence, the defendant being in the custody of the marshal, although his attorney was present. In Evans v. United States, 6 Cir. 1960, 284 F.2d 393, that

Court ruled,

> "The instructions given did not relate to trivial, inconsequential matters, but involved vital issues in the case. In our judgment, the failure to require the defendant's presence in court when the instructions were given affected his substantial rights and was prejudicial error."

It is indicated that the result might have been otherwise, had there been an absence of prejudice.

In Fina v. United States, 10 Cir. 1931, 46 F.2d 643, the Court held that the response to a jury's inquiry in open court but in the absence of and without notification to the defendant or his counsel, was reversible error, even if no actual prejudice was shown.

Later, in Little v. United States, 10 Cir. 1934, 73 F.2d 861, that court stated, where the court stenographer had been sent to the jury room to read the court's charge, in the absence of defendant and his counsel,

"We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. But where error occurs which, within the range of a reasonable possiblity, may have affected the verdict of the jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did, in fact, influence their verdict . . . The record, failing affirmatively to disclose that no prejudice did result, the verdict cannot stand." (73 F.2d at 866.)

In Jones v. United States, 10 Cir. 1962, 299 F.2d 661, the Court of Appeals for the Tenth Circuit qualified its earlier holdings. There, a juror, after the jury had commenced deliberations, made inquiry concerning an instruction, which the court answered in the absence of the defendant, but in the presence of his counsel. The Court stated, at page 662:

". . . We can let stand no conviction where the defendant was not present at all stages of the proceedings, unless the record completely negatives any reasonable possibility of prejudice arising from such error. Our review of the record here convinces us that there is no reasonable possibility of prejudice to Appellant in the instant case. The judgment in the lower court is affirmed."

The Court's attention is also called to the Annotation contained at 94 A.L.R.2d, 270. There are set forth there numerous state decisions and additional federal decisions on the question of instructing a jury in the defendant's absence.

The writer has endeavored to present to the Court the existing case law on the question dealt with in this portion of the argument.

It would be presumptious to attempt to persuade this Court that the record herein affirmatively shows that the Appellant was not prejudiced; certainly it is a matter of degree and conceivably the case falls within the Court's language in Ah Fook Chang, supra,

where it was stated that if the record discloses the error but not whether it was prejudicial, then it is presumed prejudicial.

4. APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED.

Appellant urges (opening brief, pp. 40-46) that error was committed by the trial court's failure to grant his motions for acquittal.

Following the holding of Glasser v. United States, 1941, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, the evidence must be examined in the light most favorable to the Appellee. When this is done, it is respectfully submitted, the evidence more than adequately justified the trial court's denial of the motions for acquittal. Reference is made to the Appellee's Statement of the Case, pp. 1-7, supra.

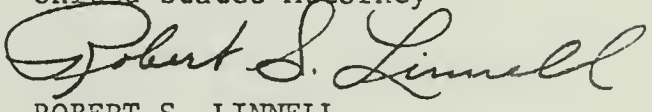
V.

CONCLUSION

In view of the foregoing arguments, and based upon the entire record herein, it is respectfully submitted that the judgment of conviction of the District Court should be affirmed. With respect to the arguments concerning the Court's communication to the jury in the absence of Appellant and counsel, Appellee's position is merely that a determination is necessary by this court as to whether an absence of prejudice appears affirmatively from the record. Appellee has not discussed herein the correctness of the supplemental instruction given the jury, but does urge that it was legally accurate and really added little, if anything, to the charge as originally given.

Respectfully submitted,

JOSEPH L. WARD
United States Attorney



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ated at Las Vegas, Nevada, April 4, 1966.

VI.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert S. Linnell

Assistant United States Attorney
Attorney for Appellee

RECEIPT

RECEIPT of a copy of Appellee's Answering Brief is hereby acknowledged this 4th day of April, 1966.

HARRY E. CLAIBORNE

S/ Harry E. Claiborne

Attorney for Appellant